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EXHIBIT A

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, *et al.*,	)	
Plaintiffs/Respondents,	)	
	)	
v.	)	No. 06-____ (9th Cir.)
	)	
AT&T CORP., *et al.*,	)	Dist. Ct. Case No. C-06-672-VRW (N.D. Ca.)
Defendants/Petitioners.	)	

PETITION BY INTERVENOR UNITED STATES FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

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INTRODUCTION AND SUMMARY

The intervenor United States hereby petitions this Court under 28 U.S.C. § 1292(b), for permission to appeal the district court's order denying the Government's motion to dismiss this action. As described below, this case clearly warrants immediate appeal because the district court has, in a highly unusual action, overruled the Government's assertion of the state secrets privilege, and has thereby placed at risk particularly sensitive national security interests.

In this case, plaintiffs claim that defendants AT&T, *et al.*, violated various constitutional and statutory provisions by allegedly providing to the National Security Agency ("NSA") the content of plaintiffs' telephone communications, as well as their communication records. The United States intervened, asserted the state secrets privilege, and moved to dismiss because this case cannot proceed without forcing revelation of highly confidential national security information.

Despite supporting declarations filed by Director of National Intelligence John Negroponte and NSA Director Keith Alexander, the district court rejected a key aspect of the Government's claim of state secrets privilege. Without proper foundation in the record, the district court determined that the alleged participation by AT&T in a Terrorist Surveillance Program established by the President to protect the security of the United States from al Qaeda could not be a state secret, and that this case can therefore proceed to partial discovery. Apparently recognizing the importance and controversial nature of its ruling, the district court *sua sponte* certified its denial of the Government's motion to dismiss for immediate interlocutory appeal.

The district court was clearly correct in certifying this matter for appeal. By denying the Government's motion to dismiss, the court directly and improperly contradicted the judgment of the Director of National Intelligence and the head of the NSA on a national security matter. The court has accordingly created a serious risk of disclosure of particularly sensitive material by providing for this litigation to continue through discovery. Moreover, the district court has done so in a case in which, because of the Government's invocation of the state secrets privilege, plaintiffs are unable to demonstrate their Article III standing. If the Government's arguments are accepted on appeal, the complaint should be dismissed.

Thus, this petition for immediate interlocutory appeal is well-founded, and should be granted. Indeed, during the June 23, 2006 hearing on the Government's motion to dismiss, plaintiffs' counsel responded to a question from the district court by stating that plaintiffs would not oppose certification under Section 1292 if the district court denied the Government's motion based on the state secrets privilege. Transcript of June 23, 2006 Hearing, at 100-01.

If this petition is granted, we suggest that this case be expedited for briefing and argument.

QUESTION PRESENTED FOR APPEAL

Whether the district court erred in rejecting an assertion of the state secrets privilege by the Director of National Intelligence, and therefore in denying the Government's motion to dismiss this action.

BACKGROUND

1. After various media stories appeared concerning asserted post-9/11 foreign intelligence activities carried out by the NSA, plaintiffs filed this action in the Northern District of California against AT&T. Plaintiffs allege that AT&T is collaborating with the NSA in a massive warrantless surveillance program, illegally tracking the content of domestic and foreign communications, as well as the communications records, of millions of Americans. Plaintiffs seek certification of a class, injunctive and declaratory relief, and monetary damages. They contend that AT&T has violated the First and Fourth Amendments to the Constitution by acting as instruments of the U.S. Government through illegal intercepts and disclosures of their communications. In addition, plaintiffs contend that AT&T has violated a variety of federal and state statutes.

Plaintiffs' allegations arose in part from the President's December 2005 public revelation of a Terrorist Surveillance Program. The President explained that he had assigned the NSA to intercept international communications of persons with known links to al Qaeda and related terrorist organizations. See Dist. Ct. Opin. at 19-20. The President took this step pursuant to his Commander-in-Chief powers, as well as under the Authorization for Use of Military Force passed by Congress shortly after 9/11, giving the President authority to punish those responsible for 9/11, and to prevent further attacks in the future. See Public Law No. 107-40 (115 Stat. 224 (2001)).

After describing the Terrorist Surveillance Program, the President further explained that the Government "does not listen to domestic phone calls without court approval," and is "not mining or trolling through the personal lives of millions of innocent Americans." Dist. Ct. Opin. at 20-21.

The Attorney General subsequently publicly confirmed that, under the Terrorist Surveillance Program, the NSA intercepts the contents of communications when the Government has a reasonable basis to conclude that one party to the communication is an agent of al Qaeda or an affiliated terrorist organization. Dist. Ct. Opin. at 20.

2. The United States intervened, asserted the state secrets privilege, as well as statutory privileges covering the NSA, and moved for dismissal or summary judgment. We argued that the case could not be litigated in light of the state secrets assertion. The invocation of that privilege was supported by public and classified declarations from the Director of National Intelligence and the NSA Director. At our suggestion, the district judge *ex parte/in camera* reviewed the classified declarations from both of these officials, which explained the privilege assertions. Dist. Ct. Opin. at 4.

We filed both public and *ex parte/in camera* briefs in support of our motion to dismiss, arguing that the state secrets privilege had been properly asserted, and that litigation over plaintiffs' claims posed a danger of disclosure of important intelligence information, sources, and methods. We further asserted that dismissal of the complaint was required because the subject matter of the case is a state secret, state secrets are necessary for plaintiffs to litigate their claims (including their ability to establish their standing), and AT&T could not defend itself without disclosure of state secrets. In so arguing, we made clear that AT&T could neither confirm nor deny whether it was indeed cooperating with the NSA concerning foreign intelligence gathering activities as alleged in the complaint. We contended that these arguments covered both plaintiffs' statutory and constitutional claims. Finally, we showed that adjudication of whether the surveillance alleged by the plaintiffs had been conducted consistently with lawful authority would require disclosure of state secrets as well.

3. By order of July 20, 2006 (a copy of which is attached to this petition), the district court denied our motion to dismiss. (The opinion is published at 2006 WL 2038464.) Critical to the court's ruling is its refusal to accept the assertion of the state secrets privilege with regard to AT&T's alleged participation in the Terrorist Surveillance Program. Dist. Ct. Opin. at 18-39. The court did so by linking together several observations to conclude – erroneously – that there could be no valid state secret assertion with respect to whether AT&T was participating with the Government in regard to alleged intelligence gathering endeavors.

The district court noted first that the President and Attorney General had announced the existence of a Terrorist Surveillance Program, designed to assist the Government in tracking al Qaeda operatives and their activities. Without citing to any part of the record, the court announced that "it is inconceivable" that the Terrorist Surveillance Program could exist without the cooperation "of some telecommunications provider." Dist. Ct. Opin. at 29.

Next, the district court described the size of AT&T and its place in the telecommunications industry, and deemed important the fact that AT&T has publicly stated that, when requested, the company cooperates with the Government within the limits of the law, and performs classified contracts. Dist. Ct. Opin. at 30-31.

The district court then put these observations together, and thereby concluded that it could not be a state secret for AT&T to admit, if true, that it is indeed working with the NSA to carry out the Terrorist Surveillance Program. Dist. Ct. Opin. at 31-35, 39-41. In doing so, the court expressly declined to rely upon a declaration from a witness for the plaintiffs (a former AT&T employee), or reports in the media. *Id.* at 25-27.

The court accordingly refused to dismiss this case on state secrets grounds, holding instead that plaintiffs are entitled to take discovery in order to probe AT&T's asserted involvement with the NSA with the Terrorist Surveillance Program. The court similarly refused to find that the subject matter of this case involves a state secret. Dist. Ct. Opin. at 31-39.

The district court further rejected the Government's motion to dismiss on the ground that AT&T would be unable to present any type of defense based on an assertion of a certification from federal officials authorizing any intercepts. Opin. at 39-40. Again, the court concluded that a relationship between AT&T and the Government with regard to the Terrorist Surveillance Program could not be a state secret. The court stated that it contemplates that AT&T will be able to confirm or deny the existence of certifications "through a combination of responses to interrogatories and *in camera* review by the court." *Id.* at 40.

Next, the court refused to dismiss plaintiffs' allegations concerning a general monitoring program of communications records, which the Government has neither confirmed nor denied. Dist. Ct. Opin. at 40-42. The court chose instead to leave this point open because "[i]t is conceivable that these entities might disclose, either deliberately or accidentally, other pertinent information about the communication records program as this litigation proceeds." *Id.* at 42.

Finally, the court rejected various other grounds for dismissal raised by the United States and AT&T. Dist. Ct. Opin. at 45-68. Included among those arguments was a challenge to plaintiffs' standing, which we asserted plaintiffs cannot demonstrate because the state secrets privilege prevents them from establishing actual injury. The court ruled that the privilege would not bar plaintiffs from receiving evidence tending to establish AT&T's alleged participation in communication content monitoring. *Id.* at 50.

At the end of its opinion, the district court *sua sponte* certified its order for immediate interlocutory appeal under 28 U.S.C. § 1292(b), because "the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion and * * * immediate appeal may materially advance ultimate termination of the litigation * * *." Dist. Ct. Opin. at 70.

REASONS FOR GRANTING PERMISSION TO APPEAL

Interlocutory appeal by the United States pursuant to Section 1292(b) is warranted when the Court finds "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The district court correctly found that the standards for Section 1292(b) have been met here. As explained at the outset of this petition, the issues in this case are of obvious importance and great public interest as they involve the question of whether the Director of National Intelligence correctly asserted the state secrets privilege in this matter, and whether the assertion of that privilege required dismissal because the plaintiffs cannot establish the facts necessary for standing and cannot state a prima facie case, while defendant AT&T is prevented from presenting its defenses.

A. The State Secrets Privilege and its Effect on this Litigation.

The ability of the Executive to protect military or state secrets from disclosure has been recognized from the earliest days of the Republic. See *Totten v. United States*, 92 U.S. 105 (1875); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953). The state secrets privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974). To apply "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer." *Reynolds*, 345 U.S. at 7-8.

The privilege protects a broad range of state secrets, including information that would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

Significantly for this case, this Court has made clear that the state secrets privilege protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir.), *cert denied*, 525 U.S. 967 (1998).

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) (*Halkin I*). "Accordingly, if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the Government to disentangle this information from other classified information." *Kasza*, 133 F.3d at 1166.

This Court has emphasized that an assertion of the state secrets privilege "must be accorded the 'utmost deference' and the court's review of the claim of privilege is narrow." *Kasza*, 133 F.3d at 1166. Aside from ensuring that the privilege has been properly invoked as a procedural matter, the sole determination for the reviewing court is whether, "under the particular circumstances of the case, 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *Id.* at 1166 (quoting *Reynolds*, 345 U.S. at 10).

Thus, in assessing whether to uphold a claim of privilege, the court does not balance the respective needs of the parties for the information. Rather, "[o]nce the privilege is properly invoked and the court is satisfied that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, the privilege is absolute[.]" *Kasza*, 133 F.3d at 1166. Further, "the Government need not demonstrate that injury to the national interest will inevitably result from disclosure." *Ellsberg*, 709 F.2d at 58.

The state secrets privilege does not simply require that sensitive information be removed from a case; if "the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Kasza*, 133 F.3d at 1166 (citing *Reynolds*, 345 U.S. at 11 n. 26).

Even if the subject matter of an action is not a state secret, the case must be dismissed if the plaintiff cannot make out a prima facie case in support of its claims absent the excluded state secrets. See *Kasza*, 133 F.3d at 1166. And, if the privilege "'deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.'" *Kasza*, 133 F.3d at 1166 (quoting *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992)). Accord *Molerio v. FBI*, 749 F.2d 815, 825

(D.C. Cir. 1984) (granting summary judgment where state secrets privilege precluded the Government from using a valid defense).

B. The District Court Improperly Overrode the Government's Assertion of the State Secrets Privilege With Regard to Allegations that AT&T Provided Communications Contents and Records to the NSA.

As noted above, we submitted to the district court public and classified declarations from the Director of National Intelligence and the NSA Director. Based on those declarations, we showed that adjudicating each of plaintiffs' claims would require confirmation or denial of the existence, scope, and potential targets of alleged intelligence activities, as well as AT&T's purported involvement in such activities. The declarations made clear that such information cannot be confirmed or denied without causing exceptionally grave damage to national security; indeed, the most basic factual allegation necessary for plaintiffs' case – whether AT&T has engaged in certain conduct at the behest of the NSA – can neither be confirmed nor denied by AT&T or the United States.

Accordingly, every step in this case — for plaintiffs to demonstrate their standing by establishing that AT&T engaged in conduct that injured them, for plaintiffs to prove their claims, for AT&T to defend against them, or for the United States to represent its interests — would immediately confront privileged information.

The district court seriously erred by overstepping its proper role concerning review of the National Intelligence Director's claim of state secrets privilege with regard to whether or not AT&T had provided to the NSA communications content under the Terrorist Surveillance Program.

The district court started with the fact that the President has announced the existence and rough contours of the Terrorist Surveillance Program. It then hypothesized – with no support in the record – that this program could not be undertaken without cooperation by members of the communications industry. The court next noted that AT&T is a large industry participant, cooperates with the Government when requested to do so through lawful means, and has stated that it engages in classified contracts. The court then put these points together in its own fashion, overrode the national security judgment of the Director of National Intelligence, and concluded that it should not be a state secret for AT&T to confirm through this litigation that, if true, it is indeed assisting the NSA in carrying out the Terrorist Surveillance Program. Thus, the court directed that discovery from AT&T should follow.

This determination by the district court represented a usurpation of the proper role of the Executive in the field of protection of information that is key to national defense. Moreover, once the court took this improper step, nearly everything else in the court's decision flowed from that mistake. Thus, for example, the court rejected our argument that the complaint must be dismissed because plaintiffs will not be able to demonstrate standing; the court reasoned that the disclosures for which it has provided could indeed lead to sufficient facts for the plaintiffs to proceed.

In analogous circumstances, other cases have been dismissed in light of state secrets privilege claims. In *Halkin I*, for example, individuals and organizations alleged that they were subject to unlawful surveillance by the NSA and the CIA due to their opposition to the Vietnam War. See 598 F.2d at 3. The D.C. Circuit upheld an assertion of the state secrets privilege regarding the identities of individuals subject to NSA surveillance, rejecting the plaintiffs' argument that the privilege could not extend to the "mere fact of interception," and despite significant public disclosures about the surveillance activities at issue. *Id.* at 8, 10.

A similar state secrets assertion with respect to the identities of individuals subject to CIA surveillance was upheld in *Halkin II*. See *Halkin v. Helms*, 690 F.2d 977, 991 (D.C. Cir. 1982). As a result of these privilege assertions in both *Halkin I* and *Halkin II*, the D.C. Circuit held that the plaintiffs were incapable of demonstrating that they had standing to challenge the alleged surveillance. See *id.* at 997.

Significantly, the D.C. Circuit held that the fact of such surveillance could not be proven even if the CIA had actually requested the NSA to intercept the plaintiffs' communications by including their names on a "watchlist" sent to the NSA—a fact not covered by the state secrets assertion in that case. See *id.* at 999-1000 ("[T]he absence of proof of actual acquisition of appellants' communications is fatal to their watchlisting claims."). The court thus found dismissal warranted, even though the complaint alleged actual interception of plaintiffs' communications, because the plaintiffs' alleged injuries could be no more than speculative in the absence of their ability to prove that such interception occurred. *Id.* at 999, 1001.[1]

Similarly, in *Ellsberg v. Mitchell,* 709 F.2d 51 (D.C. Cir. 1983), a group of individuals filed suit after learning during the course of the "Pentagon Papers" criminal proceedings that one or more of them had been subject to warrantless electronic surveillance. Although two such wiretaps were admitted, the Attorney General asserted the state secrets privilege, refusing to disclose to the plaintiffs whether any other such surveillance occurred. See *id.* at 53–54. As a result of the privilege assertion, the D.C. Circuit upheld the district court's dismissal of the claims

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1 Because the CIA conceded that nine plaintiffs had been subjected to certain types of non-NSA surveillance, the D.C. Circuit held that those plaintiffs had demonstrated an injury-in-fact. See *Halkin II*, 690 F.2d at 1003.

brought by the plaintiffs that the Government had not admitted overhearing, because those plaintiffs could not prove actual injury. See *id.* at 65.

The district court also erred here to the extent it believed that the doctrine in *Totten v. United States*, 92 U.S. 105 (1875), is limited to situations involving adjudication of alleged espionage agreements between the parties. See Dist. Ct. Opin. at 28-29. *Totten* establishes that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten*, 92 U.S. at 107; *Tenet v. Doe*, 544 U.S. 1 (2005). This rule has been applied well beyond the limited context posited by the district court here. See *Weinberger v. Catholic Action of Haw./Peace Ed. Project*, 454 U.S. 139, 146-47 (1981) (citing *Totten* in holding that "whether or not the Navy has complied with [NEPA] 'to the fullest extent possible' is beyond judicial scrutiny in this case," where, "[d]ue to national security reasons," the Navy could "neither admit nor deny" the fact that was central to the suit, *i.e.*, "that it propose[d] to store nuclear weapons" at a facility); see also *Kasza*, 133 F.3d at 1170 (relying in part on *Totten* to dismiss even though a classified espionage relationship was not at issue).

Moreover, the only other district court yet to have ruled in a case challenging the alleged surveillance of communications by the NSA has just dismissed a case whose claims overlap with this one (concerning allegations that AT&T has assisted the NSA by providing communications records). In *Terkel v. AT&T Corp.*, 2006 WL 2088202 (N.D. Ill. July 25, 2006), the court was "persuaded that requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into the government's intelligence activities. Because requiring such disclosures would therefore adversely affect our national security, such disclosures are barred by the state secrets privilege." *Id.* at 32.

The same result was required here. And, immediate interlocutory appeal is necessary so that, before the crucial confidentiality of foreign intelligence gathering information is placed at serious risk, this Court has an opportunity to consider the validity of the Government's invocation of the state secrets privilege in light of the record evidence, rather than in light of unsupported leaps made by the district court. As the Fourth Circuit has observed in upholding dismissal of a case in light of the state secrets privilege: "Courts are not required to play with fire and chance further disclosure — inadvertent, mistaken, or even intentional — that would defeat the very purpose for which the privilege exists." *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006).

* * * * * * *

In sum, the standards for an appeal under Section 1292(b) have plainly been met here. The district court's order certainly involves controlling questions of law; if our arguments are accepted on appeal, such a ruling will materially advance the ultimate termination of the litigation because dismissal will be required. As described above, the United States moved to dismiss this case because the state secrets privilege prevents the litigation from going forward, given that plaintiffs will be unable to demonstrate Article III standing, and they also cannot state even a prima facie case. Further, the privilege deprives AT&T of the opportunity to defend itself.

Moreover, even as it denied the Government's motion to dismiss, the district court certified that there is a substantial ground for difference of opinion, given that the court had overridden assertion of the state secrets privilege by the Director of National Intelligence. In similar circumstances when the privilege has been claimed, courts have upheld it, and dismissed analogous cases.

CONCLUSION

For the foregoing reasons, this petition for immediate interlocutory appeal should be granted.

Respectfully submitted,

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July 31, 2006

EXHIBIT B

FILED ENTERED LODGED RECEIVED MAR 14 2001 AT SEATTLE CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE AND JANE DOE, Plaintiffs, v. GEORGE J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, and THE UNITED STATES OF AMERICA, Defendants.	Case No. C99-1597L ORDER GRANTING DEFENDANTS' MOTION FOR AN INTERLOCUTORY APPEAL AND FOR A STAY

This matter comes before the Court on defendants' motion for certification of interlocutory orders and for a stay of further proceedings. For the reasons discussed below, defendants' motion is granted.

I. DISCUSSION

A. Interlocutory Orders

On June 7, 2000, this Court issued an Order denying defendants' motion to dismiss for lack of jurisdiction or alternatively, for failure to state a claim. See Doe v. Tenet, 99 F. Supp. 2d 1284 (W.D. Wa. 2000). On January 22, 2001, this Court denied defendants' motion for summary judgment or alternatively, renewed motion to dismiss. See Order dated Jan. 22, 2001. Defendants seek certification for interlocutory appeal of these two orders under 28 U.S.C. 1292(b).

A district court has the discretion to certify interlocutory orders when three conditions are met: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal from the order

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may advance the ultimate termination of the litigation. See 28 U.S.C. 1292(b). The moving party bears the burden of establishing that exceptional circumstances exist that "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (internal citation omitted).

A controlling question of law is one that could materially affect the outcome of the case in district court. See In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1981). Generally, "a difficult central question of law which is not settled by controlling authority" is implicated. See In re Brand Name Prescription Drugs Antitrust Litig., 878 F.Supp. 1078, 1081 (N.D. Ill. 1995) (internal citation omitted). Here, the question of whether the Totten doctrine bars plaintiffs' constitutional claims is certainly a controlling question of law. If, as defendants allege, it were deemed that plaintiffs' due process claims are barred because they implicate a contract for secret services which cannot be disclosed, this Court would lack subject matter jurisdiction. The first factor of §1292(b) is met.

Next, the Court must determine whether a substantial ground for difference of opinion exists. Interlocutory appeal should not be utilized merely to provide review of a ruling in "hard cases." United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966). Substantial grounds for difference of opinion may be demonstrated by conflicting opinions of courts that have interpreted the same legal issue. See Dorward v. Consol. Rail Corp., 505 F.Supp. 58, 59 (E.D. Pa. 1980). Limited case law on an issue is another factor that weighs in favor of establishing substantial ground for difference of opinion. See Ovando v. Los Angeles, 92 F.Supp.2d 1011, 1025 (C.D. Cal. 2000).

A recently issued federal opinion disagrees with this Court's holding in Doe v. Tenet, 99 F.Supp. 2d 1284 (W.D. Wa. 2000). In Kielczynski v. United States Central

Intelligence Agency, 2001 WL 173322 (E.D.N.Y. Feb. 20, 2001), the plaintiff alleged that he was a former CIA spy and that the CIA breached his employment contract regarding citizenship and health benefits. He alleged that his due process rights were violated because he did not receive a hearing prior to the termination of his contract. The Kielczynski court discussed the instant case and declined to adopt its holding that plaintiffs' due process claims could go forward. See id. at *9 (citing Doe v. Tenet, 99 F. Supp.2d at 1287). It did not believe that the reasoning of Doe v. Tenet was consistent with the view of the Second Circuit or with the Totten doctrine.

While this Court recognizes that there are substantial factual differences between Kielczynski and the case at bar, the particular legal question as to whether Totten bars the constitutional claims of former CIA spies is similar. The Ninth Circuit may take a less or more expansive view on the application of the Totten doctrine to plaintiffs' constitutional claims. The existence of conflicting opinions and the lack of a precedential case on point demonstrates a substantial ground for difference of opinion.

Finally, the Court must determine whether an interlocutory appeal will materially advance the termination of litigation. The central issue is whether a reversal would obviate the need for a trial. See Nobell, Inc. v. Sharper Image Corp., 1992 U.S. Dist. LEXIS 20114, *10 (N.D. Cal. June 12, 1992). If the Ninth Circuit were to find that plaintiffs' claims were barred by the Totten doctrine, a reversal of this Court's orders would likely result in a dismissal of plaintiffs' claim. This factor is satisfied. Defendants have met their burden of establishing that exceptional circumstances exist in this case that warrant the certification of this Court's orders for interlocutory appeal.[1]

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[1]Contrary to plaintiffs' assertions, it is not necessary for defendants to invoke the state secrets privilege to establish exceptional circumstances. It is clear to the Court that this case involves potentially sensitive information and the criteria of 1292(b) are met. This is sufficient

Stay of District Court Proceedings

When a stay is requested, the Court must consider the competing interests that will be affected by the grant or denial of a stay. Those interests include the possible damage that may occur from granting the stay, the hardship which a party may suffer if required to go forward, and other concerns of justice in terms of simplifying or complicating issues, proof, and questions of law. See Filtrol Corp. v. Kelleher, 467 F.2d 242, 244 (9th Cir. 1973).

Plaintiffs argue that a stay would only prolong this litigation, which would harm plaintiffs who are old and in ailing health. Plaintiffs urge the Court to deny the stay because defendant can seek protection of sensitive discovery materials by requests to the Court or by invoking the state secrets privilege. If this case went forward, defendants argue that filing an answer to plaintiffs' complaint and partaking in discovery could cause great risk of harm to national security.

The Court finds that it would be an inefficient use of judicial and attorney resources to allow discovery to continue, because the Ninth Circuit's decision in this case could negate the need for discovery. This case is stayed pending a decision from the Ninth Circuit on the interlocutory appeal of this Court's Orders.

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to show exceptional circumstances.

II. CONCLUSION

For the foregoing reasons, defendants' motion for interlocutory appeal of this Court's June 7, 2000 and January 22, 2001 Orders is GRANTED.[2] Defendants' request for a stay is GRANTED pending the outcome of the interlocutory appeal.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 14th day of March, 2001.

Robert S. Lasnik
United States District Judge

[2]Plaintiffs requested that the Totten issue be certified for appeal, rather than the entirety of both orders. However, once a district court certifies any question of law for interlocutory appeal, the appellate court may exercise jurisdiction over any issue included within the order. Jurisdiction applies to the order and not to a particular question certified by the district court. See Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996).